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In the Supreme Court of the United States

October Term, 1998

FRIENDS OF THE EARTH INC., ET AL.

Petitioners

v.

LAIDLAW ENVIRONMENTAL SERVICES (TOC), INC.

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR CALIFORNIA ASSOCIATION OF SANITATION AGENCIES AS AMICUS CURIAE SUPPORTING AFFIRMANCE

LOUIS F. CLAIBORNE
Counsel of Record
JOHN BRISCOE
SANDI L. NICHOLS
SHONA L. ARMSTRONG
Washburn, Briscoe & McCarthy
55 Francisco Street, Suite 600
San Francisco, California 94133
Tel: (415) 421-3200
Fax: (415) 421-5044
Attorneys for
Amicus Curiae

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QUESTION PRESENTED

Whether a citizen plaintiff under the Clean Water Act *always* lacks constitutional standing to seek an assessment of civil penalties payable to the federal Treasury, even if, at the time of suit (or the time when the penalties would be assessed), violations of the Act are continuing or likely to recur.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

INTEREST OF THE AMICUS 2

ARGUMENT 6

REGARDLESS OF ANY CONTINUING VIOLATION BY THE DEFENDANT OR ANY PROSPECT OF HIS RE-OFFENDING, A CITIZEN PLAINTIFF UNDER THE CLEAN WATER ACT ALWAYS LACKS CONSTITUTIONAL STANDING TO SEEK CIVIL PENALTIES 6

A. Introduction and Summary 6

B. The Issue Is Open For Consideration By The Court 9

C. Specific Deterrence Does Not Suffice To Establish Standing 12

D. The Assessment Of Penalties Is Insufficiently Related To The Citizen Plaintiff's Legitimate Interest 16

APPENDIX

TABLE OF AUTHORITIES

CASES

Page

Alden v. Maine, No. 98-436, 1999 U.S. LEXIS 4374 (June 23,1999) 20

Arizonans for Official English v. Arizona, 520 U.S. 43 (1997).....6

Chicago v. Morales, No. 97-1121, 1999 U.S. LEXIS 4005 (June 10, 1999).....17

County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985) 11

Dubois v. Department of Agriculture, 20 F.Supp.2d 263 (D.N.H. 1998) 9

Flast v. Cohen, 392 U.S. 83 (1968) 19

Frothingham v. Mellon, 262 U.S. 447 (1923) 20

Gwaltney v. Chesapeake Bay Foundation, 484 U.S. 49 (1987) ..... *passim*

Linda R.S. v. Richard D., 410 U.S. 614 (1973) 15,19,21

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 21

Marvin v. Trout, 199 U.S. 212 (1905) 16

Middlesex Cty. Sewerage Auth. v. Sea Clammers, 453 U.S. 1 (1981) 12

Myers v. United States, 272 U.S. 52 (1926) 17

CASES

Page

San Francisco BayKeeper v. Cargill Salt Division, No. C96-02161 CAL (N.D. Cal. Nov. 19, 1998) (unpublished order on pretrial and in limine motions) ..4,9

San Francisco BayKeeper v. Vallejo Sanitation and Flood Control District, CIV-S-96-1554 DFL (E.D. Cal. May, 28, 1998) (unpublished memorandum of opinion and order on summary judgement motion) 3

San Francisco BayKeeper v. Vallejo Sanitation and Flood Control District, CIV-S-96-1554 DFL, (E.D. Cal. March 1, 1999) (unpublished memorandum of opinion and order on motion to dismiss).....4

Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 118 S. Ct. 1003 (1998)..... *passim*

Tull v. United States, 481 U.S. 412 (1987) 13,19

United States ex rel. Marcus v. Hess, 317 U.S. 537 (1942) 16

Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982).....11

STATUTES

Clean Air Act, Pub. L. No. 91-604, 84 Stat. 1676 (1970), *as amended by* Act of Nov 15, 1990, Pub. L. No. 101-549, 104 Stat. 2399 17
42 U.S.C. § 7604.....17

STATUTES

Page

Clean Water Act, Pub. L. No. 92-500, 86 Stat. 816 (1972).....2,18
33 U.S.C. § 1319.....2
33 U.S.C. § 1342(b). 2
33 U.S.C. § 1365.....2
33 U.S.C. § 1365(a) 17
33 U.S.C. § 1365(b). 21
33 U.S.C. § 1365(c) 21

False Claims Act, Pub. L. No. 97-258, 96 Stat. 877 (1982), *as amended by* Act of Oct. 27, 1986, Pub. L. No. 99-562, 100 Stat. 3153 16
31 U.S.C. § 3729 et seq.....16
31 U.S.C. § 3730(d). 16

LEGISLATIVE MATERIALS

H.R. Rep. No. 911, 92d Cong., 2d Sess. (1972) 18

S. Rep. No. 414, 92d Cong., 1st Sess. (1971) 18

REGULATIONS

Cal. Water Code, § 13160..... 2

OTHER MATERIALS

Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk L. Rev. 881 (1983) 20

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BRIEF FOR CALIFORNIA ASSOCIATION OF SANITATION AGENCIES AS AMICUS CURIAE SUPPORTING AFFIRMANCE

Having obtained the consent of all parties, whose letters have been filed with the Clerk, the California Association of Sanitation Agencies respectfully submits this Brief as Amicus Curiae supporting affirmance of the judgment below.[1]

[1]No counsel for a party authored any part of this brief and no one other than Amicus Curiae made any monetary contribution to the preparation or submission of the brief.

INTEREST OF THE AMICUS

1. The California Association of Sanitation Agencies ("CASA") is a California non-profit corporation that represents California public wastewater collection and treatment agencies. Founded in 1957, CASA has approximately 100 members. They include some of the State's smallest municipal sanitation agencies, and some of the largest, such as the East Bay Municipal Utility District and the County Sanitation Districts of Los Angeles County. CASA serves as a forum for information sharing, and as a legislative and regulatory advocate for the common interests of its members.

Every member of CASA operates under, or depends upon, a permit issued pursuant to Section 402(b) of the Clean Water Act, 33 U.S.C. § 1342(b). That section implements the National Pollutant Discharge Elimination System ("NPDES") program established under Section 402 of the Act, 33 U.S.C. § 1342. Since California has a federally approved water-quality program, these permits are issued by the State's Regional Water Quality Control Boards. *See* 33 U.S.C. § 1342(b); Cal. Water Code § 13160. (In those States without such a federally approved program, the Section 402 permits are issued directly by the Environmental Protection Agency.) CASA members are thus subject to the substantial array of enforcement tools available to the state permit-issuing agencies, and to the EPA as well, which can initiate enforcement action or take over a state-initiated enforcement action, as it sees fit. *See* 33 U.S.C. § 1319.

In addition to governmental enforcement of the terms of an NPDES permit, another potent enforcement threat faces these agencies. That threat is of a suit in federal court brought by an individual, or a group, seeking injunctive relief and, of course, attorneys' fees, under the citizen-suit provision of the Clean Water Act. 33 U.S.C. § 1365. If Petitioners prevail here, such private plaintiffs may additionally seek to have the court impose civil penalties payable to the federal Treasury. The

popularity of citizen suits is on the rise. Members of CASA—indeed all NPDES permit holders around the country—are facing more frequent threats of citizen suits, and more actual such suits. (The threat of suit is most often resolved by the permit holder simply paying money to the Plaintiff as attorneys' fees in exchange for a release, thus saving itself the litigation costs.)

2. One such member agency of CASA is the Vallejo Sanitation and Flood Control District (the "District"), a local governmental body that provides sanitary sewer and flood control services for the City of Vallejo in northern California. Among other things, it operates a publicly owned treatment works that collects and treats wastewater and ultimately discharges the effluent into arms of San Francisco Bay. For those discharges, the District obtained from the California Regional Water Quality Control Board (acting as surrogate for the federal EPA) an NPDES permit under the Act. That permit, the District has asserted, set knowingly unrealistic effluent limitations which the District has been unable to meet in all respects. Although the District was therefore found in technical violation, the Board, recognizing that, at least for the moment, full compliance with the permit was not feasible, had instituted no enforcement proceedings and, indeed, had declared itself satisfied with the status quo and the District's continuing program of improvements. Nor had the responsible federal agency, the EPA, initiated proceedings. But, notwithstanding, an environmental group called San Francisco BayKeeper, invoking the citizen suit provisions of the Clean Water Act, filed its own suit against the District, seeking both injunctive relief and the assessment of civil penalties.

The United States District Court for the Eastern District of California granted summary judgment to the Plaintiff on the question of liability, postponing to a later penalty phase most of the District's defenses. *San Francisco BayKeeper v. Vallejo Sanitation and Flood Control District*, CIV-S-96-1554 DFL (E.D. Cal. May, 28, 1998) (unpublished memorandum of

opinion and order on summary judgment motion) (Appendix 1A hereto). More recently, the court separately considered the question presented here: whether a citizen plaintiff has constitutional standing to seek an assessment of civil penalties payable to the federal Treasury when continuing or recurring violations of the Clean Water Act are alleged. In a Memorandum Opinion dated March 1, 1999 (Appendix 1B hereto), the court answered the question in the affirmative, expressly disagreeing with the ruling of the District Court for the Northern District of California in the *Cargill* litigation. *San Francisco BayKeeper v. Cargill Salt Division*, No. C96-02161 CAL (N.D. Cal. Nov. 19, 1998) (unpublished order on pretrial and in limine motions) ("*Baykeeper Order*") (Appendix 1C hereto).

3. The instance just summarized is far from isolated. It is, indeed, typical of a large category of cases, occurring nationwide. As one would expect, citizen suits under the Clean Water Act and similar laws usually target alleged violations that are marginal (if they are violations at all) and that the federal and state enforcement agencies are content to monitor without initiating formal proceedings. The setting may be, as in *Vallejo*, a series of technical violations that apparently do no measurable harm to the environment and are, for the immediate future, impossible to cure. Or the case may be one in which the theory of coverage is, at best, strained and no concrete environmental damage is even suggested. Or the scenario may be a variant of these examples.

One obvious risk of the intervention of a citizen plaintiff in such cases—an intervention not subject to screening by the statutory agencies unless they choose to "take over" a lawsuit (which, in this example, they had already determined not to *initiate*)—is that needless lawsuits result, with all the attendant costs to the federal judiciary, to the defendants, and to the opportunity for negotiated solutions. Within constitutional limits, of course, one must defer to the Congressional decision to allow such suits. But it <u>does</u> make a significant practical

difference whether civil penalties can be assessed in private lawsuits. The volume of such litigation—especially the most doubtful cases—surely will diminish if a negative answer is given.

As Petitioners themselves insist, the prospect of substantial civil penalties in non-Government litigation severely inhibits a landowner or operator. More so than exposure to injunctive relief, because an injunction normally speaks only to the future and, if obeyed, imposes no significant additional financial liability on the defendant. By contrast, the threat of civil penalties is that, unless he or she retreats to unarguable conformity at the right early moment, the same landowner or operator risks a penal assessment for the past acts that may be found to violate the law, even if only as a technical matter.

No one properly can complain so far as the upshot is merely to deter serious violations. But the effect is not so limited. The many who cannot afford both the costs of litigation <u>and</u> potentially heavy financial penalties will be pushed to shelter behind a safe line that, out of abundance of caution, excludes a perfectly legal zone. This is <u>not</u> all to the good. It discourages projects ultimately beneficial to the environment and it wrongly burdens, not only private enterprise, but also governmental operators (like the Vallejo Sanitation and Flood Control District) that perform essential services in the broader public interest.

More than enough has been said to make plain that the Amicus has a real and substantial interest in this litigation.

ARGUMENT

REGARDLESS OF ANY CONTINUING VIOLATION BY THE DEFENDANT OR ANY PROSPECT OF HIS RE-OFFENDING, A CITIZEN PLAINTIFF UNDER THE CLEAN WATER ACT ALWAYS LACKS CONSTITUTIONAL STANDING TO SEEK CIVIL PENALTIES

A. Introduction and Summary

1. The present brief is addressed to a single issue (which is answered in the negative): Whether a citizen plaintiff under the Clean Water Act ever has constitutional standing to seek an assessment of civil penalties that will be paid to the federal Treasury.[2] Although this is, admittedly, a broader question than the first question stated by Petitioners, we submit it is "fairly subsumed" within the Questions Presented. It is, moreover, the very issue on which the decision below ultimately rests. And standing is, in any event, a fundamental jurisdictional prerequisite which the Court has an independent duty to satisfy itself about, regardless whether the parties have raised it, or even conceded jurisdiction. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 118 S. Ct. 1003, 1012-13 (1998); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 73 (1997).

The Court of Appeals reasoned that "[b]ecause Plaintiffs have not appealed the denial of declaratory and injunctive relief, the only potential relief that may be available to redress their claimed injuries is the civil penalty imposed upon Laidlaw, which would be paid to the United States Treasury."

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[2]We do not here address Questions 2 and 3 presented by the Petition relating to the sufficiency of a declaratory judgment to defeat mootness and to plaintiffs' entitlement to attorneys' fees notwithstanding dismissal of the case as moot. Nor do we express any view as to Respondent's Suggestion of Mootness.

149 F.3d 303, 306 (4th Cir. 1998). Invoking this Court's decision in *Steel Co.*, the appellate court went on to assert that "[s]uch penalties, however, cannot redress any injury suffered by a citizen plaintiff." *Ibid.* Hence, held the Court of Appeals, the case was now moot.[3]

We recognize that the parties, and the United States as *Amicus Curiae*, have adopted a different approach to the case. Their several submissions discuss the difference between initial standing and subsequent mootness, and assume the continuing vitality of *Gwaltney v. Chesapeake Bay Foundation*, 484 U.S. 49 (1987), insofar as that decision accepted that a citizen suitor under the Clean Water Act had both constitutional standing and statutory authority to seek civil penalties against a continuing violator or one likely to re-offend. But, obviously enough, all that debate is swept away if, as we contend, the *Gwaltney* assumption is in error and Article III of the Constitution (construed in light of the principle of Separation of Powers) denies a federal court judicial power to

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[3]Whether or not the case was, strictly speaking, "moot," it is important to stress that the ruling which concerns us here is not based on mootness, but is, rather, a decision "on the merits" that, as a matter of law, no citizen plaintiff ever has standing to initiate or maintain a suit for penalties payable to the Treasury. Plaintiffs always lacked standing to sue for penalties and, accordingly, the assessment of penalties by the District Court had to be vacated as beyond judicial power, quite independently of any "live" issue as to the propriety of an injunction or other relief.

We do not read the Court of Appeals' *arguendo* assumption that Plaintiffs "had standing to initiate this action" as intimating anything to the contrary. *See* 149 F.3d at 306 n.3. Presumably, such standing was deemed to be supported by their prayer for injunctive relief to abate a continuing or recurring violation (*see Steel Co.*, 118 S. Ct. at 1019), not on the assumption that Plaintiffs once had standing to seek penalties, but no longer do. This appears to be confirmed by the Fourth Circuit's effective overruling of a prior decision which had recognized a citizen plaintiff's standing to seek penalties in a case of continuing or potentially recurring violations. 149 F.3d at 306-7 n.4.

entertain a private claim for penalties payable solely to the Treasury, even when the defendant is a current or likely recurring violator. Staking our argument on this fundamental ground, we are excused from defining a "continuing" or "recurring" violation, as opposed to a "wholly past" violation, and have no occasion to apply the special rules of the mootness doctrine as to the standard of proof required to establish no prospect of recurrence. As we have said, the sole submission of the present brief is that Plaintiffs never had standing to advance the penalty claim and, on that basis alone, the penalty award must be vacated. *See* n.3, *supra*.

2. We begin by noticing how this Court's decision in *Steel Co.* has affected the issue: At the least, it has placed a question mark over the Court's assumption in *Gwaltney* that, in the case of a continuing or recurring violation, a citizen plaintiff under the Clean Water Act has standing to seek civil penalties. We then note that, with respect to Article III standing, *Gwaltney* itself appears simply to have accepted the premise put forward by the parties and by the United States, without independent analysis. No other decision of this Court having reached the question, we conclude that it is open for plenary consideration at this time.

Next, we deal with the contention that the deterrent effect of exposing a violator to civil penalties at the suit of a citizen plaintiff establishes standing. Initially, we point out that, however much fear of penalties may have contributed to goading a violator to earlier compliance, the actual assessment of penalties made after the risk of further violations has ended serves no present or future deterrent purpose and, accordingly, cannot be said to redress the plaintiff's injury in any way. In any event, we go on to demonstrate by a series of examples, that even specific deterrence of future unlawful conduct is not always sufficient to confer standing on an injured citizen. However obvious the effect, the relief sought must have a close nexus to the injury complained of and must be one that the plaintiff appropriately can invoke.

Finally, we examine more closely whether the assessment of civil penalties payable to the Treasury is a weapon a private citizen properly can wield. We conclude that it is not, both because to lend such a weapon to a private plaintiff impermissibly trenches on the constitutional prerogatives of the Executive and because, in any event, the remedy is insufficiently related to the underlying injury.

B. The Issue Is Open For Consideration By The Court

1. It may be, as the Court below held, that *Steel Co.* resolves the question addressed here in Respondent's favor. *See Baykeeper Decision supra* (reading *Steel Co.* as announcing a "flat rule" disallowing, in all circumstances, the assessment of civil penalties payable to the Treasury in a citizen suit under the Clean Water Act). Or it may be that *Steel Co.* has effectively adopted the less categorical rule articulated in *Dubois v. Department of Agriculture*, 20 F.Supp.2d 263 (D.N.H. 1998). There, *Steel Co.* was construed as holding that the only deterrent relief relevant to the "redressability" element of standing is that which, at the time the relief is granted, predictably will deter future violations. Thus, if (as there) the court has already issued an injunction that insures against further violations, any request for civil penalties becomes moot. And, by a parity of reasoning, no penalties can be assessed when, at the time of the actual assessment, even without an injunction, all violations have ceased and there is no basis for anticipating their resumption. It might be argued that the present case fits that description, but there is reason to doubt it.[4]

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[4]We accept (as Petitioners and the United States argue at some length) that the denial of an injunction does not necessarily reflect a view that the violation reasonably cannot be expected to recur. An injunction often is denied simply because there is no real prospect of recurrence. In this case, however, the District Court apparently believed there was some risk that Laidlaw would re-offend, commenting that the assessment of penalties and attorneys' fees would provide "adequate

While we endorse both of these results, we do not rest on the assertion that either of them has been definitively settled by this Court in *Steel Co.* On the other hand, one can say without undue boldness that, at present, the constitutional standing assumption of *Gwaltney*, if still alive, is not altogether well. At the least, *Steel Co.* has placed a question mark over that aspect of the *Gwaltney* ruling.

The contrast between the *Steel Co.* Court's discussion of citizen standing in respect of injunctive relief and in respect of civil penalties is too stark to ignore. In the former context (discussed last), it is expressly conceded that a citizen plaintiff has standing to seek an injunction to abate a continuing violation or a threatened recurrence. *Steel Co.*, 118 S. Ct. at 1003. But, when civil penalties are considered, no comparable statement is volunteered. On the contrary, the only concession is that such penalties "might be viewed as a sort of compensation or redress to [the citizen plaintiff] if they were payable to [him] . . . [which] they are not." *Id.* at 1018. The notion that penalties would likely redress the plaintiff's injury by deterring the defendant from continuing or resuming his unlawful conduct is (pointedly?) left unsaid.

So, also, the *Steel Co.* Opinion, while reciting that, in *Gwaltney*, "Article III standing was . . . found," does not endorse or approve that finding. *Id.* at 1011. Thus, it is fair to conclude that the *Steel Co.* Court deliberately left our question open—so far as it could.

2. Of course, the retort can be made that, by careful silences, the Court could not open an issue already firmly resolved by earlier precedents. But "resolved" implies a matter as to which the opposing views, with supporting arguments, were submitted to the Court and considered by it. So far as we can discern, that was not the situation in *Gwaltney* or any prior case.

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deterrence." Pet.Br. 32-33.

As it happens, this Court decided no citizen suit seeking civil penalties under the Clean Water Act or other comparable legislation before *Gwaltney*; nor (except for *Steel Co.*) has it considered any since. Stray statements in opinions dealing with entirely different claims are obviously of little import. *See Middlesex Cty. Sewerage Auth. v. Sea Clammers*, 453 U.S. 1, 14 n.25 (1981); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 314 (1982); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 226 (1985). The whole weight of "precedent," such as it is, accordingly falls on *Gwaltney*.

The fact is that neither of the immediate parties in *Gwaltney*, nor the United States as *Amicus Curiae*, raised the issue tendered here.[5] Nor did the Court discuss it. The

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[5]To be sure, in *Gwaltney* Petitioner (the Defendant) and the United States (initially in footnotes) invoked both Article III and Article II against the contention that a citizen plaintiff could seek penalties for wholly past violations. Brief for Petitioner, *Gwaltney v. Chesapeake Bay Foundation*, 484 U.S. 49 (1987) ("Pet. Br."), at 37 n.48; Brief for United States as Amicus Curiae, *Gwaltney v. Chesapeake Bay Foundation*, 484 U.S. 49 (1987) ("U.S. Br."), 21-22 n.34; Reply Brief for Petitioner, *Gwaltney v. Chesapeake Bay Foundation*, 484 U.S. 49 (1987), 15-17. Contrary to Petitioners (Pet.Br. 15), this is not "the identical redressability argument that the court of appeals adopted in the present case," but a much more limited submission. Even then, moreover, Gwaltney submitted that the Court could "avoid the necessity of reaching the constitutional issues" by accepting its statutory construction. Reply Brief for Petitioner 17. And the United States likewise stated that these "serious constitutional questions would arise" only if the Clean Water Act were construed to permit private citizens to seek penalties payable to the Treasury in respect of wholly past violations. U.S. Br. At 20-21.

Two *Amicus* briefs, among almost a dozen, did advance more comprehensive constitutional objections to the provision for civil penalties at the suit of a citizen plaintiff. Brief as Amicus Curiae of Bethlehem Steel Corporation et al. and Brief as Amicus Curiae of Rollins Environmental Services (N.J.), in *Gwaltney v. Chesapeake Bay Foundation*, 484 U.S. 49 (1987). But, despite a disclaimer in

Gwaltney Opinion, so far as it briefly dealt with Article III, was preoccupied solely with the argument advanced by the Defendant there "that failure to require proof of allegations under § 505 would permit plaintiffs whose allegations of ongoing violation are reasonable but untrue to maintain suit in federal court even though they lack constitutional standing." *Gwaltney*, 484 U.S. at 65-66. To be sure, in rejecting this argument, the Court assumed that a citizen plaintiff enjoyed Article III standing to pursue a claim for civil penalties in respect of an ongoing violation. But so much was conceded on all sides, including by the United States, and there was no occasion to wrestle with the question. Thus, if not strictly a "drive-by jurisdictional ruling" (*see Steel Co.*, 118 S. Ct. at 1011), the Article III premise of *Gwaltney* is properly characterized as an unchallenged assumption, rather than a considered decision. Such a finding is manifestly more open to reconsideration without offending the principle of *stare decisis*—attenuated, in any event, as that doctrine is in constitutional cases.

C. Specific Deterrence Does Not Suffice To Establish Standing

With this preamble, we turn to the merits of our submission that a citizen plaintiff under the Clean Water Act always lacks constitutional standing to seek civil penalties payable to the federal Treasury. The first step to that end is to expose the flaw in the proposition that deterrence, or at least specific deterrence of the defendant, is the sufficient test of standing.

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one case (Brief as Amicus Curiae Bethlehem Steel et al. at 7 n.7), both these submissions, alleging, *inter alia*, a violation of the Appointments Clause of Article II, reach much further than our argument, necessarily challenging the constitutionality of Section 505(a)(1) of the Clean Water Act as a whole, including the authorization to sue for injunctive relief. Nothing in the Court's Opinion suggests that these contentions were considered.

Petitioners argue at some length that, in practice, the fear of substantial penalties assessed at the suit of a private citizen, albeit the penalties would be paid into the federal Treasury, is a very real deterrent to violations of the Clean Water Act, and, more particularly, acts as a strong deterrent to a specific violator from continuing or resuming the unlawful conduct that has injured the plaintiff. Passages from opinions of the Court are pleaded in aid. *See Tull v. United States*, 481 U.S. 412, 423 (1987). The lesson is then drawn that the actual or threatened imposition of penalties, by causing the violator to cease his wrongful conduct, "redresses" the plaintiff's injury, at least for the future (in the same way as a prohibitory injunction does), and hence confers standing.

The premise is freely granted. Indeed, the practical objection to penalties available at the instance of a private suitor is that they tend to over-deter. *See* "Interest of the Amicus," *supra* at 4-5. But the legal conclusion does not follow.

1. At the outset, it is worth stressing that the assessment of penalties payable to the Treasury can "redress" a private plaintiff's injury only by deterring future conduct. As the Court noted in *Steel Co.* (118 S. Ct. at 1018), such penalties cannot serve as "compensation" or "remediation" for any past injury to a citizen plaintiff. Moreover, it is arguable, as *Dubois* held, that the actual imposition of civil penalties can be deemed specific deterrence only if, at that time, there remains a real prospect of violation—a prospect that does not exist when the defendant has irretrievably changed his practices or when an outstanding injunction already assures against re-offending. But, even so, there are concededly many situations—apparently including the present case—in which civil penalties have the practical effect of inhibiting future violations. The question remains whether such an effect establishes redressability.

2. The truth is that deterrent effect, while it is a necessary ingredient of any relief that is not compensatory, is not always sufficient to satisfy Article III. The fallacy is readily shown.

For instance, we suppose all would agree that subjecting potential violators to suit for civil penalties, payable to the Treasury, by anyone, regardless of special interest, would have a substantial deterrent effect. Experience tells us that, at least in the environmental field, there would be no dearth of "volunteers" ready to sue, even though they have suffered no cognizable injury and have nothing personally to gain from the litigation. Yet, such a scheme plainly would violate Article III. The reason, to be sure, is the absence of any "concrete," "personalized" injury to the plaintiff, as much as failure of "redressability." But the point remains that deterrence is not the talisman it is claimed to be.

It may be said, more conservatively, that where injury and causation are present, the third element of standing, "redressability," necessarily is satisfied once it is shown that the relief sought would tend to deter the conduct which causes the plaintiff's injury. But that is not the law, nor could it be. For the proposition proves too much. Since any relief (always coupled, as it is, with a claim for attorneys' fees) would produce some deterrent effect, the redressability requirement would have evanesced.

One need only assume (however unrealistically) a revised law providing that, win or lose in all other respects, a citizen plaintiff who establishes a violation of the Clean Water Act (and comparable laws) always recovers his attorneys' fees and costs from the defendant, even when it is shown that the violation irrevocably and independently ceased well before the litigation was conceived. Of course, such an award cannot redress any present injury. But it is entirely plausible to claim that, under such a regime, the likelihood of the defendant having violated the law in the past, and thereby injured the plaintiff, is measurably diminished. And, in any event, given the substantial sums involved, one must concede that such a rule would work as a real incentive to a violator to reform his conduct sooner rather than later. This, however, does not entitle a citizen plaintiff to pursue an otherwise moot case.

Steel Co., 118 S. Ct. at 1018-1020, and cases there cited.

Why not? As the Court has noted, the award of attorneys' fees "would assuredly benefit [the plaintiff] as opposed to the citizenry at large." *Id.* at 1018. And, as we have just said, the prospect of such an award—the amount of which usually significantly increases as time goes by—would tend to redress his injury by goading the defendant into swifter compliance. Redressability thus appears to be satisfied. But there remains a basic obstacle, inhering in the fact that the recovery of "the cost of bringing suit" is merely incidental, a "by-product," of the underlying litigation. *Id.* at 1019. To grant such an award when all other relief is foreclosed would be to allow the tail to wag the dog, and a dead dog at that. More fundamentally, the connection is too circuitous, too fortuitous and too indirect to confer standing.

The same point—that deterrence alone is not enough to confer standing even on a plaintiff who has suffered cognizable injury—is illustrated by a quite different hypothetical. Let it be assumed that Congress amends the citizen suit provision of the Clean Water Act to permit a plaintiff to seek, and a court to grant, a mandatory order requiring the responsible federal agency to prosecute, criminally or civilly, as the court finds appropriate, a particular alleged violator (in contrast to the present law, which only authorizes a suit to compel the performance of a nondiscretionary duty). Presumably, the availability of such an additional enforcement tool would introduce a further deterrent to the unlawful conduct that has injured the plaintiff. Yet, there can be no doubt that a private individual is without standing to pursue such a remedy, not only because it would involve both him and the court in an impermissible usurpation of Executive prerogatives, but on the more immediate ground that "a private citizen lacks a judicially cognizable interest in the prosecution or non-prosecution of another." *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973).

The question to which we now turn is whether a like impediment denies standing to a citizen plaintiff seeking to

maintain a suit for the purpose of directly provoking the assessment of a civil penalty payable to the Treasury. Our submission is that, here also (arguably more so), standing is barred unless one overrides Article III on the pragmatic ground that a laudable end justifies any means conducive to the desired result.

D. The Assessment Of Penalties Is Insufficiently Related To The Citizen Plaintiff's Legitimate Interest

"How's that, again?" is the likely reaction of the untutored ear when asked whether a private citizen properly may bring suit to compel a violator of federal environmental law to pay a fine to the Government. It is certainly a very odd solution to turn over to entirely private individuals or associations the collection of statutory penalties due the Treasury. Unsurprisingly, except for the hoary and quite distinguishable precedent of *qui tam* actions,[6] modern legislation contains no

[6] *Qui tam* actions have been with us since the beginning and the surviving example, in the False Claims Act, 31 U.S.C. § 3729 *et seq.*, dates from 1863. *See United States ex rel. Marcus v. Hess*, 317 U.S. 537, 540-542 and n.7 (1942). Their distinctive feature, of course, is that, unlike the citizen suit provisions of current environmental laws, they give the plaintiff a stake in the monetary recovery by allowing him to keep a substantial share of the award. *See* 31 U.S.C. § 3730(d), as amended by Pub. L. No. 99-562 § 3, 100 Stat. 3153.

Even so, it must be an open question whether the *qui tam* provisions of the False Claims Act which condone the suit of a plaintiff who has "no interest whatever in the controversy" except to recover his informer's grant (*Marvin v. Trout*, 199 U.S. 212, 225 (1905)) can survive this Court's recent standing precedents requiring a "particularized injury." *See Steel Co.*, 118 S. Ct. at 1030 (Stevens, J., concurring). The venerable pedigree of *qui tam* actions, going back to pre-Revolutionary England (*see Marvin*, 199 U.S. at 225), is, of course, no guarantee of constitutionality. After all, the point of the Constitution was not always to import the much-vaunted (and often exaggerated) "rights of Englishmen" for the benefit of now free

such scheme until the environmental laws of the last three decades. Indeed, as late as 1970 when the citizen suit provision of the Clean Air Act (42 U.S.C. § 7604) was framed, legislators apparently believed it right to confine private plaintiffs to injunctive relief. *See* Pub. L. No. 91-604, § 12(a), 84 Stat. 1676; *Gwaltney*, 484 U.S. at 62 ("citizen suit provisions authorized by the Clean Air Act . . . are wholly injunctive in nature.")

The awkward character of the innovation imported into the Clean Water Act in 1972 is betrayed by the language used. Instead of straightforwardly providing that a citizen may sue to have the courts "award" or "assess" civil penalties, Section 505(a) (33 U.S.C. § 1365(a)), empowers district courts to "enforce [an] effluent standard or limitation [imposed by the Act], or [an] order [issued by the EPA Administrator or a State with respect to such a standard or limitation] . . . and to apply any appropriate civil penalties [provided for under the government enforcement section]." This strange terminology—"apply," followed by an unexplained "appropriate"—seems to reflect Congressional unease about this new idea of making penalties payable to the federal Treasury available in private lawsuits.

What is more, the introduction of penalties in citizen suits was, at best, half-hearted. As Petitioners correctly stress (Pet.Br. 35-37),[7] and as this Court has explained more than

Americans, but, in some cases, to repudiate English institutions—most notably in establishing a government based on separation of powers. In the early years of the Republic, however, legislators, lawyers and judges, steeped in the common law, sometimes accepted English precedents without noticing that the American Constitution announced a different principle. *See, e.g., Chicago v. Morales*, No. 97-1121, 1999 U.S. LEXIS 4005 (June 10, 1999) at *20 n.20. Indeed, even a Founding Father like Hamilton, or a distinguished Chief Justice like Marshall, could get it wrong, at least initially. *See Myers v. United States*, 272 U.S. 52, 136-37, 139-42 (1926).

[7] In stressing that the Clean Air Act was the model for the citizen suit

once, *Sea Middlesex*, 453 U.S. at 17-18 n.27; *Gwaltney*, 484 U.S. at 62, the citizen suit provision of the Clean Water Act was expressly modeled on the comparable provision of the Clean Air Act, albeit the earlier law did not authorize the assessment of penalties in such private actions. While the new authority to assess penalties is duly noted in the legislative reports, no significance is attached to the innovation. *See, e.g.*, S. Rep. No. 414, 92d Cong., 1st Sess. 79 (1971); H.R. Rep. No. 911, 92d Cong., 2d Sess. 133 (1972). The Court has accordingly concluded that, in the context of a citizen suit (unlike a governmental enforcement action), civil penalties are a mere adjunct of injunctive relief: "citizens, unlike the Administrator, may seek civil penalties only in a suit brought to enjoin or otherwise abate an ongoing violation." *Gwaltney*, 484 U.S. at 59.

In sum, even the Congress of 1972 appears to have been hesitant and uncomfortable when it imported governmental penalties into private litigation, and in *Gwaltney* the Court also seems to betray some unease with the innovation, confining it severely. We submit these doubts were well founded and today should lead to a total rejection of the concept.

2. Our objection, it must be emphasized, reaches only penalties. There is nothing anomalous in a private citizen obtaining an injunction against the wrongdoer who is injuring him or has injured him and is likely to do so again. This is so when the form of the order is prospective, restraining the defendant from continuing or resuming his unlawful conduct; such a prohibitory injunction is directly aimed at preventing the plaintiff's further injury, and, thereby, will afford him at least partial redress. And it is equally so when a "mandatory" or "remedial" injunction is sought, requiring the defendant to

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provision of the Clean Water Act, Petitioners appear to have forgotten that the former did not, as of 1972, authorize the assessment of civil penalties in private lawsuits. That did not happen until 1990. *See* Pub. L. No. 101-549, § 707(a), 104 Stat. 2399.

remove, so far as possible, the cause of a past violation which continues to injure the plaintiff. But the case is quite different when penalties payable to the Treasury are assessed in a citizen suit.

What is peculiarly offensive to the principle of standing is the concession to a private citizen to maintain what is essentially a prosecution for a Governmental fine. The practice of other centuries and other jurisdictions notwithstanding, it is today settled in American federal law that such a plaintiff has no standing to seek the imposition of a criminal penalty (notwithstanding the obvious deterrent effect), given that he "lacks a judicially cognizable interest in the prosecution . . . of another." *Linda R.S.*, 410 U.S. at 419. Yet, the "civil penalties" involved here are also "punitive" in nature, *Tull*, 481 U.S. at 423, and, from the point of view of the citizen plaintiff, would seem to be equally none of his or her business. Since he or she does not share in the assessment or otherwise show any direct interest in the penalty, it is not sufficient that the citizen, quite gratuitously, gains an indirect benefit from the suit. The relation between relief and injury may be causally proven, but it is nevertheless too attenuated, depending as it does on inappropriately lending the plaintiff a Governmental weapon to which he or she has no right.

3. This is not a situation in which it is even arguably appropriate to relax the bar of standing. Even if it were a proper ground for bending the rules, there is here no risk that fundamental constitutional principles or important legislative goals will go unenforced if private citizens are not allowed to vindicate them in the courts. *Compare Flast v. Cohen*, 392 U.S. 83, 98 n.17, 116 (Fortas, J., concurring) (1968). Under our submission, citizen suits for injunctive relief against persistent violators of the Clean Water Act are unaffected, as are actions to compel the administrators of the law to perform their assigned tasks. And, of course, the full arsenal of enforcement weapons, including civil and criminal penalties, remains available in governmental litigation.

Nor can Petitioners be heard to argue that the constitutional requirement of standing safely can be waived in the present context for the opposite reason: that barring private suits is pointless since the Government can always achieve the same assessment by initiating its own action. In this Court, it is unnecessary to elaborate the truth that adherence to the minimum constitutional standing requirements serves the fundamental principle of Separation of Powers and cannot be abandoned simply because, in a given context, it may make no practical difference. *See* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk L. Rev. 881, 892-93 (1983). Here, as where Federalism concerns are involved, the line of demarcation cannot be ignored simply because pragmatic considerations (albeit put forward by the Solicitor General) suggest it. *See Alden v. Maine*, No. 98-436, 1999 U.S. LEXIS 4374, (June 23, 1999), at *92. Besides, as the Court wrote in *Alden*, "[t]he difference between a suit by the United States . . . and a suit by [private citizens] implicates a rule that the National Government must itself deem the case of sufficient importance to take action . . . ." *Id.* at 92.

A final word is appropriate. Much of the law of standing, from *Frothingham v. Mellon*, 262 U.S. 447 (1923), onward, has been announced in cases where a citizen was suing Governmental officers who, allegedly, were violating the Constitution itself or a duty imposed by Congress. In that context, one can more readily appreciate the counter-arguments for relaxing standing, lest the law be set at naught. Even so, it has been suggested that stricter standards may be appropriate when the underlying claim, instead of a minority right which the political branches are less likely to vindicate, is a "majoritarian" one, typically a complaint that the relevant administrative agency has injured the public at large, and incidentally the plaintiff, by failing to enforce the law against a particular violator. Scalia, *supra*, at 894-95. While adopting that distinction, we go further.

In a case like the present (as has been said), there is no ground for apprehension that the law will go unenforced. But, more fundamentally, when the citizen is acting as a "private attorney general," who, far from asserting any right against Government, is seeking to vindicate the public (or governmental) interest, one ought to be cautious in too generously conceding standing. *Cf. Linda R.S.*, 410 U.S. at 617-19. The lawsuit may, after all, be in derogation of the legitimate prosecutorial discretion constitutionally assigned to the Executive Branch under Article II—a Constitutional transgression of Separation of Powers which would be beyond the power of the court to arrest once it has allowed the suit to go forward.[8] Although it was addressed to a different question, we invoke here the Court's warning in *Gwaltney* against an "interpretation of the scope of the citizen suit [that] would change the nature of the citizen's role from interstitial to potentially intrusive." *Gwaltney*, 484 U.S. at 61. The only proper course, we submit, is to insist that the citizen plaintiff is seeking a remedy that is related, immediately, directly and without excursions into foreign territory, to his own injury. *Cf. Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-562 (1992). An injunction will satisfy that test; an assessment of penalties payable only to the Treasury does not.

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[8]Actual conflicts between citizen suits and Governmental enforcement actions may have been largely eliminated by the requirement of a 60-day notice to the agency before filing suit, together with the opportunity given to the Government to pre-empt the litigation (33 U.S.C. § 1365(b)), supplemented by the later-added requirement of like notice before any consent judgment is entered in a citizen suit (33 U.S.C. § 1365 (c)(3)). But under the *Gwaltney* regime there remains the serious anomaly of an assessment of penalties, payable to the Treasury, when the Government, for good reason, has determined not to file suit and does not deem such penalties appropriate in all the circumstances.

CONCLUSION

For the reasons stated, the judgment below should be affirmed, at least insofar as it vacates the assessment of civil penalties against Respondent.

Respectfully submitted.

LOUIS F. CLAIBORNE
Counsel of Record
JOHN BRISCOE
SANDI L. NICHOLS
SHONA L. ARMSTRONG
Washburn, Briscoe & McCarthy
Attorneys for Amicus Curiae

July 19, 1999

APPENDIX 1A

SAN FRANCISCO BAYKEEPER V. VALLEJO SANITATION AND FLOOD CONTROL DISTRICT, CIV-S-96-1554 DFL (E.D. CAL. MAY, 28, 1998) (UNPUBLISHED MEMORANDUM OF OPINION AND ORDER ON SUMMARY JUDGEMENT MOTION)

THE THREE ORDERS WHICH COMPRISE THIS APPENDIX WERE REPRODUCED FROM THE SIGNED ORIGINALS. NO ATTEMPT TO CORRECT ERRORS, TYPOGRAPHICAL OR OTHERWISE, HAS BEEN MADE.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

SAN FRANCISCO BAYKEEPER,

Plaintiff

v.

VALLEJO SANITATION AND FLOOD CONTROL DISTRICT,

Defendant

No. CIV-S-96-1554 DFL

MEMORANDUM OF OPINION AND ORDER

Plaintiff San Francisco BayKeeper ("BayKeeper") brings suit charging defendant Vallejo Sanitation and Flood Control District (the "District") with violating the Clean Water Act, 33 U.S.C. §§ 1251-1387. BayKeeper alleges that the District has discharged pollutants into the San Pablo Bay and San Francisco Bay Estuary at Mare Island Strait and Carquinez Strait in violation of its NPDES permit. BayKeeper also alleges that the District has violated the permit's reporting requirements. The parties have filed cross-motions for summary judgment as to defendant's liability for the alleged violations.

I.

The District operates a Publicly Owned Treatment Works ("POTW") and provides sanitary-sewer and flood protection services for the City of Vallejo. The POTW treats wastewater from the Vallejo area, and discharges effluent through two outfall pipes, one in the Carquinez Strait and the other in Mare Island Strait. The Clean Water Act §§ 1311-1342 prohibits the discharge of pollutants into navigable waters except as authorized under a National Pollutant

Discharge Elimination System ("NPDES") permit. Such a permit states that the terms under which the acquiring party must operate, including types and amounts of pollutant emissions allowed (i.e., effluent limitations), discharge prohibitions, self-monitoring requirements, and reporting requirements. Discharges from the District's POTW are governed by NPDES Permit No. CA0037699 (the "Permit"), which was issued by the California Regional Water Quality Control Board (the "Board") in late 1988.

Violations of an NPDES permit are violations of the Clean Water Act. Hawaii's Thousand Friends v. Honolulu, 821 F.Supp. 1368, 1392 (D. Haw. 1993). "The Clean Water Act imposes strict liability for NPDES violations and does not excuse 'de minimus' or 'rare' violations." Id. (citing Sierra Club v. Union Oil Co. of Cal., 813 F.2d 1480, 1491 (9th Cir. 1988), vacated for reconsideration, 485 U.S. 931 (1988), reinstated and amended, 853 F.2d 667 (9th Cir, 1988)). A plaintiff may establish a violation of an NPDES permit by comparing limitations imposed by the permit with the self-monitoring reports of the discha[illegible]er. Sierra Club, 813 F.2d at 1492. The data contained i[illegible] self-monitoring reports are to be considered "conclusive [illegible]idence of an exceedence of a permit limitation." Id. The defendant's "intent" and "good faith" and the degree of the violations are irrelevant to the issue of liability, and are considered only in the penalty phase of the litigation. Hawaii's Thousand Friends, 821 F.Supp. at 1392 (citations omitted).

II.

The court concludes that summary judgment is appropriately granted to BayKeeper for violations by the District of permit effluent limitations and reporting requirements. Whether these violations are significant or merely trivial or technical must await the penalty phase.

The District makes a number of preliminary arguments that purport to identify jurisdictional or constitutional bars to a finding of liability. First, the District claims that BayKeeper

may not bring this citizen enforcement action because the Board has declared that the District is in compliance with its NPDES permit. However, the Clean Water Act permits a citizen suit by "any citizen" against "any person" alleged to be in violation of an NPDES permit. 33 U.S.C. § 1365. Although a citizen suit may be precluded when state or federal enforcement actions are underway, there is no preclusion or estoppel effect from a regulatory agency's decision not to take an enforcement action. See, e.g., Citizens for a Better Env't v. Union Oil Co. of Cal., 83 F.3d 1111, 1119-1120 (9th cir. 1996), cert. denied 117 S. Ct. 789 (1997). Thus, while the Board's view of the District's performance is relevant at the penalty stage, the Board's apparently favorable opinion of the District does not bar BayKeeper from bringing this action.

Second, the District claims that if the court imposes the remedies that BayKeeper seeks this would constitute a violation of the District's due process rights and would amount to a taking. This argument is directed particularly to the chlorine and bypass/overflow limits in the permit. According to the District, when these limitations were imposed the Board knew that the District would not be able to avoid violations but nonetheless included these standards in the permit with the comment and assurance that in considering enforcement action the Board would take into consideration the effects of weather and the District's diligence in pursuing various capital improvements. The District did not seek a modification of the permit or challenge the permit in State court and may have waived any right to challenge the permit's limitations in the context of a taking claim.

Assuming that the District has not waived a challenge to the permit and that a citizen suit could be viewed as working a taking, the District's taking contention is not ripe for review. At the penalty stage the court will determine whether or not the District could have complied with the permit and what penalty, if any, is appropriate. Once these

issues have been resolved, the court will return to the taking argument if the District chooses to advance it.

Third, in its reply brief to its motion, apparently as an afterthought, the District claims that the citizen suit provision of the Clean Water Act violates Article II of the U.S. Constitution. This argument appears for the first time in the District's brief, is made after the motion filing deadline, and does not allow BayKeeper an opportunity to respond prior to oral argument. Moreover, the untimeliness of the argument also hinders the court's ability to certify the constitutional question to the Attorney General without undue delay to this litigation. See 28 U.S.C. § 2403. The District's claim that its challenge is only to the provision "as applied" is of no force given that the District claims that the citizen suit provision usurps powers allocated to the President in the "take care" and appointments clauses. In these circumstances, the court deems this argument waived.

Fourth, the District seeks to use the "single operational upset defense"- - a penalty phase mitigation concept - - as the basis for a jurisdictional challenge under Gwaltney of Smithfield v. Chesapeake Bay Foundation, 108 S. Ct. 376 (1987). Section 1319(d) of the Clean Water Act lists the factors that a court should consider in calculating civil penalties for Permit violations:

> In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith effort to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

33 U.S.C. § 1319(d) (emphasis added).

By its express terms, the "single operational upset" concept is limited to subsection 1319(d). Thus, it is solely applicable to the fixing of the penalty. As stated by the Third Circuit:

> We note initially that the single operational upset ("SOU") defense is not a defense to liability, but relates only to the amount of penalties the district court may impose [footnote]. The SOU defense is contained in subsections relating to calculation of penalties . . . and by its terms it is limited to the subsection in which it is contained. Thus even if we were to find that [the discharger] was entitled to invoke the SOU defense, this would not preclude summary judgment on liability.

Public Interest Research Group of New Jersey v. Powell Duffryn Terminals, Inc., 913 F.2d 64, 76 (3rd Cir. 1990), cert. denied 498 U.S. 1109 (1991). Furthermore, the single operational upset concept applies only to collapse simultaneous violations of different effluent limitations into a single violation; it does not direct that multiple days of violations of any one parameter should be deemed a single violation if the consequence of an operational upset. It follows that multiple days of violations of an effluent limitation need not be considered as a single day of violation, although the court would have discretion to do so in setting a just penalty.

The District argues that many of the violations can be collapsed into one under the single operational concept and that when so viewed BayKeeper has failed to show the jurisdictional prerequisite of ongoing violations, at least as to certain of the effluent limitations, particularly the chlorine limitation. Under the Clean Water Act, in order to prevail on the merits, a citizen plaintiff must prove ongoing violations or a reasonable likelihood of continuing future violations of the Act. Sierra Club v. Union Oil Co. of Cal., 853 F.2d 667, 670 (9th Cir. 1988), citing Gwaltney of Smithfield v. Chesapeake Bay Foundation, 108 S. Ct. 376, 386 (1987). In the Ninth Circuit, a citizen plaintiff may prove that a violation is ongoing "either (1) by proving violations that continue on or after the date the complaint is filed, or (2) by

adducing evidence from which a reasonable trier of fact could find a continuing likelihood of a recurrence in intermittent or sporadic violations." Sierra Club, 853 F.2d at 671 (citation omitted).

Even assuming that BayKeeper must show that violations are ongoing as to each effluent limitation, BayKeeper has done so by proving violations, parameter by parameter, occurring after the complaint was filed.[1] It need prove no more. Further, the District's attempt to collapse various of the violations into one fails; as noted above, the statute does not deem multiple violations of the same effluent limitations as if it were but one.

The District makes a further preliminary argument, which is not jurisdictional but which is a basic theme of its defense to liability. The Permit expressly gives discretion to the District to decide whether certain violations should give rise to enforcement actions. The District argues tautologically that the exercise of this discretion defines the violation such that there is no violation unless the District concludes that there has been one. This is something of a variation on the argument, addressed above, that the District's finding of compliance will bar a citizen suit.

The Permit lists certain "Discharge Prohibitions" at Section A. These prohibitions forbid bypasses or overflows of untreated or partially treated wastewater "other than during peak wet weather flows in excess of the five-year design storm." In Section B, the Permit includes effluent limitations for various parameters such as chlorine residual and total suspended solids. The numerical limitations are prefaced with the statement that "Effluent discharged shall not exceed the following limits." In Section D, the Permit addresses the District's compliance decisions:

[1] For example, the evidence reveals that after the complaint was filed the District discharged chlorine in excess of the 0.0 mg/l limitation on approximately 212 occasions at Carquinez Strait and on approximately three occasions at Mare Island Strait.

4. In reviewing compliance with Effluent Limitation B.1.a. and B.1.b for Daily Maximum Limits, and B.2. of this Order, the Board will take special note of difficulties encountered in achieving compliance during wet weather periods when ordinary treatment capabilities are impeded by peak flows and storm-water diluted influent.

5. The discharger shall achieve full compliance with Prohibitions A.1., A.2., and A.3. of this Order for wet weather flows by completing the proposed Wet Weather Treatment Facilities and the current Infiltration/Inflow Corrections Program improvements in accord with the following time schedule. [The permit includes two identified construction projects and improvements as well as a completion date for the task]

6. Violations of Prohibitions A.1., A.2. and A.3. of this Order which occur as a result of wet weather flows prior to completion of the collection system and treatment facility improvement projects identified above shall be evaluated by the Board on a case by case basis, taking into account the degree of progress being made by the Discharger toward satisfactory completion of these improvements.

The language quoted above will not sustain the District's contention that there can be no violation unless the Board finds that the District is out of compliance with the District's improvement program. The Permit defines the Board's prosecution policy; it does not define violations or prohibitions according to the District's tautology.[2]

[2] It is doubtful whether a Permit could define effluent limitations and other prohibitions in the open-ended fashion advocated by the District and still be consistent with the Clean Water Act's anti-backsliding provisions. See 33 U.S.C. § 1342(o).

III.

The District's arguments above are advanced as to all of the limitations in the Permit. In addition, the District makes specific arguments as particular effluent and bypass/overflow limitations.

A. Chlorine Residual

BayKeeper claims that on numerous occasions, both before and after the filing of the Complaint, the District violated the Permit's chlorine residual limitation of 0.0 mg/1.

The District claims that it would be impossible to comply with the 0.0 mg/1 limitation, and that to hold it to that standard would be unconstitutional. For the reasons discussed above, this argument is properly considered at the penalty phase of the litigation.[3]

The District further contends that it is not bound by the 0.0 mg/1 standard because the Board's chlorine residual enforcement guidelines ("CREG") states that a chlorine residual discharge of 3.3 mg/1 is acceptable. However, the CREG is merely an enforcement guideline going to the Board's prosecutorial discretion and does not modify the 0.0 mg/1 limitation of the Permit. See, e.g., Citizens for a Better Env't v. Union Oil Co. of California, 83 F.3d at 1119-1120. Moreover, there are strict federal and state regulations, substantive and procedural, for modifying an NPDES permit.

[3] The court notes that if the District believed its NPDES Permit to be unreasonable, it had at least two remedies. First, within 30 days of the Permit's issuance, the District could have petitioned for review of the permit and ultimately may have sought review of the Permit in state court. See Cal. Water Code §§ 13320, 13324, and 13325. Additionally, as described in the text, the District could have sought a modification of its Permit.

Moreover, a challenge to provisions contained in an NPDES permit is a mater for the Water Board, and not for this court. California Pub. Interest Research Group v. Shell Oil Co., 840 F.Supp. 712, 718 (N.D. Cal. 1993).

Id. at 1120; see Cal. Code Regs. tit. 23, § 2235.2; 40 C.F.R. §§ 122.62, 122.63, 123.25(22), 124.10-17. A modification requires a finding of cause by an enforcement agency, preparing a draft permit, and public notice requirements. See e.g., Citizens for a Better Env't v. Union Oil Co. of Cal., 861 F.Supp. 889, 899 n.2 (N.D. Cal. 1994), aff'd 83 F.3d 1111 (9th Cir. 1996), cert. denied 117 S. Ct. 789 (1997). The modification requirements "cannot be evaded with the cooperation of compliant state regulatory authorities." Union Oil Co., 83 F.3d at 1120. "Unless properly modified in accordance with these procedures, the permit as originally issued remains in effect, and violations of the permit may be subject to a citizen enforcement suit." Union Oil Co., 861 F.Supp. at 899 n.2 (citations omitted). There is no evidence showing that the District or the Board, by way of CREG, complied with mandatory modification requirements with respect to the 0.0 mg/1 limitation on chlorine residual discharges.

B. Total Suspended Solids

For total suspended solids ("TSS") the Permit provides that discharges must not exceed a daily maximum of 60 mg/1, a weekly average of 45 mg/1, and a monthly average of 30 mg/1. According to the District it did not violate the TSS limitations because the Permit states: "In reviewing compliance with effluent limitations, the Board will take special note of difficulties encountered in achieving compliance during wet weather periods when ordinary treatment capabilities are impeded by peak flows and storm-water diluted influent." However, as already discussed, this provision guides the Board's prosecutorial discretion and does not abrogate the Permit's express effluent limitations as to TSS.

Defendant has violated the TSS effluent limitations on several occasions, and at least on two occasions after the complaint was filed.

C. Copper

At Carquinez Strait, a deep water outfall, the effluent limitation on copper is 200 micrograms (ug)/1. The limit at the Mare Island Strait outfall is 20 ug/1. The District has exceeded the effluent limitation on Cooper at Mare Island Strait on numerous occasions before and after the filing of the complaint.

The District concedes that it exceeded the 20 ug/1 limitation; however, it claims that on those occasions there was a wet weather condition such that the Mare Island Strait outfall was acting as a deep water outfall and should be held only to the 200 ug/1 limitation.[4] However, the Permit does not state or imply that during wet weather months the 20 ug/1 limitation for Mare Island Strait converts into a 200 ug/1 limitation. The District bases its argument on material external to the Permit - - principally, the draft permit now under consideration. The court may consider the draft permit and the conditions in which the Mare Island outfall copper limits were exceeded at the penalty stage.

D. Settleable Matter

As to settleable matter, the Permit provides that discharges must not exceed an instantaneous maximum of .2 ml/hr and a monthly average of .1 ml/hr. The record indicates that the District has violated these limitations prior to and subsequent to the filing of the complaint. Defendant claims that some of the exceedences should not be considered because they were

[4] During dry weather the District discharges its waste into Carquinez Strait. During wet weather the District is permitted to divert certain discharges from Carquinez Strait into the more shallow waters of Mare Island Strait. During wet weather, the District may blend partially treated wastewater with fully treated wastewater when making discharges into Carquinez Strait. However, the District may only discharge fully treated wastewater into Mare Island Strait.

not detected as part of its official monitoring program. Again, the District is making a mitigation argument as if it could define liability. The Permit does not grant safe harbor for violations that are detected in monitoring that exceeds the monitoring required by the Permit. While the District's assiduous monitoring may factor into the penalty decision, a violation is a violation no matter the source of the information.

E. Median and Total Coliform

The Permit imposes a limitation of 240 MPN (Most Probable Number)/100ml for median coliform and 10,000 MPN/100ml for total coliform. The evidence shows that the District has violated these effluent limitations prior to and after the filing of the complaint.

F. Bypass/Overflow Limitations

The permit prohibits "[t]he bypass or overflow of untreated or partially treated wastewater to waters of the State, either at the treatment plant or from the collection system or pump stations tributary to the plant, other than during peak wet weather flows in excess of the five-year design storm, as defined in the Discharger's Sewer System Evaluation Survey (January 1988)." According to the District's Sewer System Evaluation Survey, a "five-year design storm" is a rain event having a duration of four hours, an intensity of 0.4 inches per hour, and a total volume of 1.6 inches. BayKeeper claims that the District violated this prohibition over 2,000 times, 500 of which occurred after the complaint was filed.

According to the District it has complied with the Permit's bypass and overflow provisions. The District states that at the time that the Permit was issued, the Board implemented a 9-year program for the District to make improvements to its treatment facility that would enable it to address its overflow problems. The Permit required that these improvements be completed by December 15, 1996, and provided that the

Board would evaluate violations occurring as a result of wet weather on a "case by case basis, taking into account the degree of progress being made by the Discharger toward satisfactory completion of these improvements." As discussed above, this language of the Permit is directed to the Board's enforcement policies and not to the definition of a violation.

The District also claims that discharges of less than 1,000 gallons are not violations of the Permit because under California law it did not have to report those violations. See 23 CCR §§ 2250, 2260. However, the regulations do not purport to modify NPDES permits. The District's Permit does not exclude discharges of less than 1,000 gallons from the overflow and bypass provisions.

IV.

BayKeeper claims that the District violated the Permit's Follow-Up Letter requirement on 1,109 occasions.[5] The Permit states that reports of Permit violations must be submitted to the Regional Board:

> In the event the discharger violates or threatens to violate the conditions of the waste discharge requirements and prohibitions or intends to experience a plant bypass or treatment unit bypass . . . the discharger shall notify the Regional Board office by telephone . . . and confirm this notification in writing within 7 working days of the telephone notification. The written report shall include time and date, duration and estimated volume of waste bypassed, method used in estimating volume and person notified of the incident. The report shall include pertinent information explaining reasons for the noncompliance and shall indicate what steps were taken to prevent the problem from recurring.

Def.'s Exs., Ex. D, p. 10.

However, the Permit states that the "Regional Board may waive [written report requirement] on a case-by-case basis."[6] According to the District, on February 10, 1989 the Board informed the District that bypasses and overflows of 1,000 gallons or more should be reported by telephone and that a written report would be required only if requested by the Board. See Allen Decl. Ex. F. The District argues that the follow-up letter requirement only applies to bypasses and overflows, and that as to bypasses and overflows, the District has waived the requirement.

The first part of the District's argument founders on the language of the Permit. In A.G.2 the reporting requirement is triggered by a violation of the Permit's "waste discharge requirements and prohibitions or . . . a plant bypass." (Emphasis added). Similarly 10.c. applies to "[a]ny upset that exceeds any effluent limitation in the permit: in addition to "[a]ny unanticipated bypass that exceeds any effluent limitation in the permit." Thus, the reporting requirement is not limited to bypasses and overflows; any violation of the Permit's "waste discharge requirements and prohibitions" must be followed by a written report.

The waiver argument fails because no evidence has been provided that the Regional Board waived the written report on a "case-by-case basis." At best, the evidence shows that Blair Allen, a staff member of the Board, told the District

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[5] BayKeeper has withdrawn its allegations that the District violated cover letter and monitoring provisions contained in the Permit.

[6] The waiver provision appears at C.10.c and is part of a reporting section that addresses noncompliance that may endanger health or the environment. Reports under C.10 must be made orally within 24 hours. A written report must follow within 5 working days. The interplay of the C.10 standard reporting requirements with the particularized reporting requirements in part A.G.2 is confusing, particularly in light of language at part B.IV.C: "Any overflow, bypass or significant non-compliance incident that may endanger health or the environment shall be reported according to sections G.1 and G.2 of Part A."

that follow-up written reports were not necessary and that the Board so instructed the 120 public agencies responsible for sewage systems within the Board's area of supervision. Such blanket advice does not amount to a "case by case" waiver as called for by the Permit. Of course, the Board's advice will be taken into consideration at the penalty stage.

V.

The parties dispute what is meant by a "day" of violation. For the reasons stated by BayKeeper the court finds that a "day" of violation as used in 33 U.S.C. § 1319(d) refers to a calendar day and not to any 24 hour period.

VI.

The court declines to decide the precise number of days of violation by the District on the current briefing. With this reservation, BayKeeper's motion for summary judgment on liability is GRANTED and the District's motion for summary judgment on liability is DENIED.

IT IS SO ORDERED.

Dated: May 27, 1998.

/s/

DAVID F. LEVI

United States District Judge

APPENDIX 1B

SAN FRANCISCO BAYKEEPER V. VALLEJO SANITATION AND FLOOD CONTROL DISTRICT, CIV-S-96-1554 DFL, (E.D. CAL. MARCH 1, 1999) (UNPUBLISHED MEMORANDUM OF OPINION AND ORDER ON MOTION TO DISMISS)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

—

SAN FRANCISCO BAYKEEPER,

Plaintiff

v.

VALLEJO SANITATION AND FLOOD CONTROL DISTRICT

Defendant.

—

CIV-S-96-1554 DFL

—

MEMORANDUM OF OPINION AND ORDER

—

Plaintiff San Francisco BayKeeper ("BayKeeper") brings suit against Vallejo Sanitation and Flood Control District (the "District"), asserting violations of the Clean Water Act ("CWA") 33 U.S.C. § 1251-1387. Relying on certain language in the Supreme Court's recent decision in Steel Company v. Citizens for a Better Env't, 118 S. Ct. 1003 (1998), the District contends that Baykeeper lacks standing to assert a claim for civil penalties.[1]

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[1] The District urges the Court to give preclusive effect to a partial grant of summary judgment in San Francisco Baykeeper v. Cargill, No. 96-02161 (N.D. Cal. Nov. 19, 1998), in which the district court held that Steel Company "established an absolute rule of law that if a plaintiff is not entitled to recover the penalties sought in the action . . . the plaintiff does not have standing under Article III of the Constitution to seek such penalties." Id. at ¶ 4. However, "[o]nly a final judgment that is sufficiently firm can be issue preclusive." Robi v. Five Platters, Inc., 838 F.2d 318, 326 (9th Cir. 1988) (citation and internal quotations omitted). No final judgment has been issued in Cargill under Federal Rule of Civil Procedure 54(b), and orders issued prior to judgment are subject to

Redressability - - "a likelihood that the requested relief will redress the alleged injury" - - is one of the three constitutional requirements for standing, in addition to injury in fact and causation. Id. at 1017. The District interprets Steel Company to hold that civil penalties paid to the federal government can never redress the injury of a citizen-plaintiff for Article III purposes, because the penalties are not paid to the plaintiff.

The District reads Steel Company too broadly. Steel Company held only that a claim for civil penalties paid to the federal government could not support Article III standing for a citizen-plaintiff alleging wholly past injuries; its holding did not embrace cases involving allegations of ongoing harm. See 118 S. Ct. at 1018-19. The plaintiff in Steel Company brought a citizen suit under the Emergency Planning and Community Right-to-Know Act of 1986 ("EPCRA"), which requires users of certain toxic and hazardous chemicals to file annual reports detailing how they used and disposed of the chemicals to file annual reports detailing how they used and disposed of the chemicals. See id. at 1008-9. At the time the plaintiff filed suit, the defendant was in complete compliance with EPCRA. See id. at 1009. The plaintiff did not allege a violations. See id. at 1019 (noting that the complaint contained no allegation of "a continuing violation or the imminence of a future violation"). In this setting, the Curt found that payment of finds to the Treasury could not satisfy the redressability requirement because the fines did not go to the plaintiff and "psychic satisfaction is not an acceptable Article III remedy." Id. at 1019.

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reconsideration by the district court. In these circumstances no preclusive effect ought be given to the provisional decision of the district court in Cargill. See St. Paul's Fire and Marine Ins. Co. v. F.H., V.W., 55 F.3d 1420, 1425 (9th Cir. 1995); Avondale Shipyards v. Insured Lloyd's, 786 F.2d 1265, 1269 (9th Cir. 1986).

Steel Company did not disturb the Court's prior decision in Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc. 484 U.S. 49, 108 S. Ct. 376 (1987), which held that a citizen-plaintiff may seek civil penalties under the CWA if there is an allegation of "continuous or intermittent" violations. See, id. at 57, 108 S. Ct. at 381. Under Gwaltney, allegations of continuing violations are sufficient to confer Article III standing to seek civil penalties. See id. at 64, 108 S. Ct. at 385. If the Court in Steel Company intended to overrule Gwaltney, surely it would have said so. Yet the opinion, if anything, ratified Gwaltney's finding of Article III jurisdiction in the presence of continuing violations. Steel Company, 118 S.Ct. at 1011.

The District counters that the Court in Steel Company made no distinction between past and ongoing violations in holding that civil penalties could not remedy a citizen-plaintiff's injury. But the Court was not called upon to address the situation in which ongoing violations are alleged.

There is no question that Baykeeper has standing to seek injunctive relief based on its claim of present and future violations. See Steel Company, 118 S. Ct. at 1019 ("if [plaintiff] has alleged a continuing violation or the imminence of a future violation, the injunctive relief request would remedy that alleged harm"). In the context of ongoing violations, civil penalties are similar to injunctive relief. They both deter future violations by a particular defendant thereby redressing threatened harm to the plaintiff. And they operate in similar fashion; injunctive relief is backed by the contempt power and deters in large part by the threat of monetary sanctions just as civil penalties do. See Natural Res. Defense Council Inc. v. Texaco Ref. & Mktg. Inc., 2 F.3d 493, 503 n.9 (3d Cir. 1993) ("Citizen file actions [under the CWA] primarily to deter future violations by the named defendant and other potential polluters, and the imposition of penalties significantly enhances the deterrent effect of a citizen suit."). Steel Company's reasoning thus does not

support the denial of standing to citizen penalties if they allege ongoing or continuous violations by the defendant.[2]

Under the Steel Company standard, Baykeeper has standing to seek civil penalties. Baykeeper's complaint alleges that the District's violations of its NPDES permit are "ongoing, continuous or intermittent and in all likelihood will continue to occur." (Compl. ¶ 27.) Baykeeper's allegations of future injury are particular and concrete. In granting summary judgment for Baykeeper on the issue of liability, the court has already found that Baykeeper has proven "violations, parameter by parameter, occurring after the complaint was filed." (May 28, 1996 Memo. of Opinion and Order at 7.) Moreover, Baykeeper has submitted evidence of even more recent violations by the District.[3]

[2] A rule denying citizen-plaintiffs standing to seek civil penalties, whether or not there is an allegation of ongoing injury and violation, would be a rather dramatic development in the law given that civil penalties payable to Treasury are an enforcement tool available in citizen suits under a number of environmental statutes. See, e.g., 42 U.S.C. § 7604(a) (Clean Air Act); 42 U.S.C. § 6972(a) (1) (A) (Resource Conservation and Recovery Act of 1976); 42 U.S.C. § 9659(a) (1) & (c) (Comprehensive Environmental Response, Compensation, and Liability Act). Nothing in Steel Company suggests the Court intended to effect such a fundamental change in these remedial schemes.

[3] The District advances two mootness cases decided in the wake of Steel Company, but they are distinguishable. Neither Friends of the Earth, Inc. v. Laidlaw Env'tl Serv. Inc., 149 F.3d 303 (4th Cir. 1998), petition for cert. filed, 67 U.S. L.W. 3364 (Nov. 9, 1998) (No. 98-822), nor Dubois v. U.S. Dep't of Agric., 20 F.Supp.2d 263 (D.N.H. 1998), involved allegations of ongoing CWA violations. In contrast, Baykeeper not only has alleged ongoing violations by the District, but has bolstered those allegations with concrete evidence.

For the foregoing reasons, the District's motion to dismiss and its motion for leave to file a supplemental answer are DENIED.

IT IS SO ORDERED.

Dated: March 1, 1998.

/s/
DAVID F. LEVI
United States District Judge

APPENDIX 1C

SAN FRANCISCO BAYKEEPER V. CARGILL SALT DIVISION,
NO. C96-02161 CAL (N.D.CAL. NOV. 19, 1998)
(UNPUBLISHED ORDER ON PRETRIAL AND IN LIMINE MOTIONS)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

—

SAN FRANCISCO BAYKEEPER; CITIZENS COMMITTEE TO COMPLETE THE REFUGE,

Plaintiffs

v.

CARGILL SALT DIVISION; CARGILL, INCORPORATED,

Defendants

—

No. C 96-02161 CAL

—

ORDER ON PRETRIAL AND IN LIMINE MOTIONS

—

The Pretrial Motions of Plaintiffs San Francisco BayKeeper and Citizens Committee to Complete the Refuge ("Plaintiffs"), and the Motions in Limine of Defendants Cargill Salt and Cargill, Incorporated ("Cargill") regularly came on for hearing before the Honorable Charles A. Legge, in the above-entitled court, on September 2, 1998. Plaintiffs appeared by Helen H. Kang and Eb F. Luckel of Goodman/Kang. Cargill appeared by Edgar B. Washburn and Sandi L. Nichols of Washburn, Briscoe & McCarthy.

Having read and considered all of the pleadings, records, motions, briefs, and oral and written testimony submitted by the parties on the issues raised by the respective motions, the following findings and orders were made, as set forth in more detail in the transcript of the September 2, 1998 hearing on these motions, which is attached hereto and incorporated herein by reference:

1. The remaining plaintiffs in the action are San Francisco BayKeeper and Citizen's Committee to Complete the Refuge. Michael Lozeau is no longer a plaintiff following

this Court's ruling in January, 1998 that he did not have standing to bring this action, and, thus, he is not a party to the pretrial motions. The remaining plaintiffs do have representational standing to sue on behalf of their respective members. (Sierra Club v. ALCOA, 585 F. Supp. 842 (N.D.N.Y. 1984). The Court makes no ruling on Cargill's motion that the remaining plaintiffs lack organizational standing to sue "on their own behalf." Instead, the Court will allow plaintiffs to amend their first amended complaint to allege facts to establish organizational standing. Cargill can challenge the amended pleading if it deems it appropriate.

2. The Court has previously found, in connection with the motions on summary adjudication, that there was harm to the "pond." This was an element of the Court's ruling granting plaintiffs' motion for summary judgment on liability. Plaintiffs do not again need to establish harm to the "pond" to establish their standing.

3. The plaintiffs have established representational standing and do not need to put on any further evidence of their representational standing at trial. The issue of whether plaintiffs have organizational standing remains an open and unresolved issue.

4. Neither San Francisco BayKeeper nor Citizen's Committee to Complete the Refuge have standing to seek civil penalties in this action. The U.S. Supreme Court, in Steel Co. v. Citizens for a Better Environment, 140 L. Ed. 2d 210 (1998), established an absolute rule of law that if a plaintiff is not entitled to receive the penalties sought in the action, such as here, where any penalties would go to the U.S. Treasury, the plaintiff does not have standing under Article III of the Constitution to seek such penalties. The penalties would not redress any injury of plaintiffs, as explained by the Steel Co. court. (See also Friends of the Earth v. Laidlaw Environmental, 1998 U.S. App. LEXIS 16298 (4th Cir. July 16, 1998).)

5. The plaintiffs' March 25, 1996 60-day notice, as well as their supplemental 60-day notice of November 8, 1996, do not provide the requisite specificity to permit this Court to

accept jurisdiction over any alleged discharges before 1991. The notices failed to provide sufficient information from which Cargill could identify any dates prior to 1991 on which they allegedly had violated the Act. This is further demonstrated by the fact that the injunctive relief mentioned in the 60-day notices and the complaint seeks only the prevention of future violations and not a required cleanup. The 60-day notices were sufficient to confer jurisdiction only over acts taken beginning March 25, 1991.

6. Whether the five-year statute of limitations of 28 U.S.C. § 2462 applies to the plaintiffs' claims for injunctive relief is the subject of a later hearing to be held on November 20, 1999.

7. To the extent there are remaining pretrial motions or motions in limine not addressed by the above rulings, the Court makes no ruling on them at this time. The parties may renew such motions at a later date if they deem it necessary.

IT IS SO ORDERED.

Dated: November 19, 1998.

/s/

CHARLES A. LEGGE

United States District Court Judge